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In The Supreme Court of The United States

OCTOBER TERM, 1929

No. 493

STATE OF FLORIDA AND A. S. WELLS, E. S. MATTHEWS AND MAMIE G. EATON as and constituting FLORIDA RAILROAD COMMISSION,

Appellants,

-versus-

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA—ATLANTA DIVISION.

BRIEF FOR APPELLANTS.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA—ATLANTA DIVISION.

BRIEF FOR APPELLANTS.

Official reports of the opinions of the Court below and of the Interstate Commerce Commission.

The opinions of the Court below upon hearing and rehearing are cited and dated and officially reported as follows:

State of Florida vs. United States, dated Jan. 17, 1929, 30 Fed. (2d) 116.

State of Florida vs. United States, dated Mch. 22, 1929, (on rehearing) 31 Fed. (2d) 580.

Report of the Interstate Commerce Commission accompanying the Order sought to be enjoined, set aside and annulled, is dated and cited as follows:

Georgia P. S. Commission vs. A[illegible] C. L. R. R. Co., dated Aug. 2, 1928, 146 I. C. C. 717.

STATEMENT OF JURISDICTION.

On January 27, 1930, this Court announced its finding that probable jurisdiction had been shown.

STATEMENT OF THE CASE.

This is an appeal from the Final Decree of the United States District Court for the Northern District of Georgia, Atlanta Division, (R-170) which refused certain injunctions prayed with regard to an order of the Interstate Commerce Commission and denied all relief prayed and dismissed the bill and supplemental bill (R-170).

At or about the time that the original bill was filed in the Court below by the Appellants here, there were two other suits filed in the same Court attacking the same order of the Interstate Commerce Commission, to-wit: Brooks-Scanlon Corporation, et al., versus United States, et al., and, Wilson Lumber Company, et al., versus United States, et al. The three suits were consolidated below for the purpose of hearing. Similar decrees were entered in all. Appeals were taken to this Court from all such decrees and all are now before this Court as numbers 493, (the case at bar), 494, (the Brooks-Scanlon case), and 495, (the Wilson Lumber Company case).

In view of the fact that the three cases involve much the same questions, the transcripts were certified and printed under the same cover. The record in the case at bar (the State case), appears first in the printed volumes. Then follows the record in the other two cases in their numerical order. The transcript of the proceedings before the Commission (including a narrative statement of the testimony there had) and various other exhibits and documents are printed but once, to-wit: in the State case, and are by reference made a part of the record in the other two cases

respectively by apt words and in the proper places.

The proceedings before the Interstate Commerce Commission were adversary proceedings instituted by complaint before the Interstate Commerce Commission, in which Georgia Public Service Commission was sole complainant, and Atlantic Coast Line Railroad Company was sole defendant (R. 193).

The gist of the complaint was the alleged unreasonable level of the carload Interstate rate of Atlantic Coast Line Railroad (and none other) on logs, except cherry, walnut and cedar, from points of origin in Florida to destinations in Georgia, and the relationship between that rate on the one hand, and the mileage scale of intrastate log rates of the same carrier, between points in Florida up to 170 miles, on the other hand.

The object of the complaint was declared to be (Section 3, R. 193):

> "To secure reasonable rates on logs from all points on the Atlantic Coast Line Railroad as hereinafter shown within the State of Florida to all destinations on the said Atlantic Coast Line Railroad in the State of Georgia, and to have removed any unjust discrimination or undue prejudice found to exist as provided in the Interstate Commerce Act."

The prayers of the complainant were (R-197): (a) that an order be made requiring the carrier to desist from the alleged violation of the act; (b) that the Commission determine and prescribe just, reasonable, non-discriminatory and non-prejudicial interstate rates from all points in Florida to all destinations in Georgia, and that such rates be no higher than the rates concurrently in effect for the same kind of property from producing points located within Florida, moving in intrastate commerce, to destinations in Florida; and (c) that such further orders be made as the Commission might consider proper in the premises.

The Atlantic Coast Line, the sole defendant named in the complaint, answered denying that its interstate rates were unjust and unreasonable, denying that it was res-

ponsible for any discrimination, denying any violation of the Interstate Commerce Act, as amended, and demanding that "it be hence dismissed." As the case was a typical *relationship* case, there were as usual various interventions, some by other carriers, and some by lumber manufacturers, but no intervenor sought to broaden the issues and, the orders of the Commission permitting intervention were upon the express condition that no evidence should be introduced by the intervenor which would unduly broaden the issue raised in the complaint, (Typical. R. 209). The State of Florida was served with notice and while it filed no formal answer, it appeared in the proceedings in due course.

At the hearing before the examiner, substantially all the evidence adduced by the Georgia Commission, the complainant there, consisted of rate comparisons. It was clearly shown that the sole purpose of the complaint was to extend the intrastate rate interstate. (See testimony of Georgia Rate Expert, R-417, 418, 419), (statement of Chairman, Perry, R-421).

And the defendant carrier made it plain that it was in nowise proposing any change in the Florida intrastate rate (voluntarily established and maintained by it) under the circumstances in which the State rate was applied in Florida but was opposing the extension of the State rate interstate or elsewhere (R. 495, 496, 719) (Commission's Rep. R. 794). It was shown that most of the carrier's intrastate log traffic moved in trainloads (R. 476, 477, 797) and that no substantial amount, if any, logs were moved by that carrier in interstate traffic (R. 796).

The carrier proposed for application between *north Florida* points of origin and Georgia destinations the interstate scale of rates which was ultimately prescribed by the Interstate Commerce Commission for the limited area above mentioned (R. 486). In the course of the proceedings the defendant carrier introduced an estimate of the cost of an intrastate log train movement over a single route from two points of origin near Perry in Taylor County, Florida, to a point of destination near Jacksonville, Florida, (R.523-526). Also it produced two letters written by the Florida

Railroad Commission respectively in 1914 and 1915 (at or about the time the Florida State rate was established and long before the several horizontal increases) in which the Florida Commission criticized the level of the Florida State rate so voluntarily established by the carrier (R. 473). The State in turn by its expert made a critical analysis and report upon the cost study of the defendant carrier and showed a materially lower cost of service than that shown by the carrier. (R. 633-641). At the Examiner's hearing the Florida Railroad Commission expressed the unqualified opinion that the State rate so voluntarily established and maintained by the carrier was clearly compensatory under the circumstances in which it was being applied (R. 629).

All of this of course was pertinent to the primary issue of the level of the interstate rate and to the incidental question of the relationship of the interstate and intrastate rates along the Florida-Georgia border.

The appellants at the conclusion of the Complainant's evidence (R. 467) and again at the conclusion of the Defendant's evidence (R. 562), and again at the hearing before the Commission (R. 792) expressly challenged the sufficiency of the evidence and the power of the Commission and in due course expressly asserted that any testimony taken by them was subject to that challenge (R. 562). But the Commission held that the evidence justified consideration of the case on its merits and denied the motions of the appellants to dismiss. (R. 792).

The report and order of the Commission is without parallel in this sort of a proceeding.

The Commission found in terms, that while the complainant assailed the rates from all points on defendant's lines in Florida to all points on its lines in Georgia,

> "the record shows that insofar as the interstate rates are concerned, relief is desired only with respect to rates on logs * * * from that portion of Florida lying North of and including Jacksonville, Gainesville, Burnett's Lake, and High Springs, hereinafter referred to as *North Florida*, to destinations in Georgia for *distances* not exceeding

170 miles" (italics ours). (R. 792).

The Commission by its report found to be reasonable a scale of distance rates for application interstate from *North Florida points of origin* to Georgia destinations *up to but not exceeding 170 miles.* Although "North Florida" as defined by the Commission (i. e. points North of and including Jacksonville, Gainesville, Burnett's Lake and High Springs), included only a small portion of the Florida lines of the Atlantic Coast Line Railroad, *the Commission prescribed no interstate rates elsewhere than from points of origin in that limited area.*

The Commission then proceeded to discuss the *level* of the Florida intrastate rate; the report quoted the defendant Coast Line as not considering that rate reasonably compensatory for intrastate traffic (although the Coast Line's expert testified that he made no such statement (R. 491.)) The Commission thereupon declared *the belief* of the Commission to be that it was manifest that the intrastate rates assailed were less than reasonably compensatory. The commission thereupon found that,

> "the Florida intrastate rates assailed, which are lower than the interstate rates herein found reasonable for corresponding distances, result, and will result in undue preference and advantage of shippers of intrastate traffic within the State of Florida, in undue prejudice to shippers of interstate traffic from points in the State of Florida to points in the State of Georgia, and in unjust discrimination against interstate commerce.
>
> "We further find that said undue preference and advantage, undue prejudice, and unjust discrimination can and should be removed by the establishment of rates for intrastate application within Florida which shall correspond with the rates herein found reasonable for interstate application from Florida to Georgia.
>
> * * * *
>
> "An appropriate order will be entered" (R. 799)."

The formal order required the defendant carrier to apply the distance scale of rates from points of origin in the limited area in North Florida to Georgia destinations in interstate commerce, and proceeded to require the defendant Coast Line,

> "to cease and desist from practicing the undue preference and advantage, undue prejudice, and unjust discrimination found in said report to exist in the *relation of intrastate and interstate rates*, and to establish, put in force, and maintain rates for the transportation of logs, * * * in car loads, * * * in intrastate commerce within the State of Florida which shall be the same as those prescribed in the next preceding paragraph hereof as reasonable for transportation in interstate commerce from points in the State of Florida to destinations in the State of Georgia." (Italics ours). (R. 801).

The report and order of the Interstate Commerce Commission were rendered by Division 4 of the Commission. The appellant in due course filed a petition for reargument and reconsideration directed to the whole Commission. (R. 841). There, among other things, the appellant asserted that the conclusion of Division 4 of the Interstate Commerce Commission with respect to the intrastate rates was unsupported by any competent evidence, was beyond the scope of the proceeding, was without lawful foundation and was an unwarranted invasion of the rights of the State of Florida reserved to it under the Constitution (R. 842, 856, 860, 861).

The appellant likewise specially asserted that the issues and the parties to the proceeding were so confined and restricted that the attempt on the part of the Commission to exercise any such general regulatory power over Florida intrastate rates was an invasion of the rights of the State reserved to it under the Constitution. (R. 861).

In due course the full Commission denied the petition for reconsideration and argument (R. 870). No attack was made by the appellant in any of the proceedings before the Interstate Commerce Commission or in the court below upon the interstate rate prescribed for the limited area in

North Florida. The position of the appellant throughout was that the interstate rate was purely a paper rate and for that limited area it was entirely within the power of the Commission in this proceeding to prescribe it.

In due course, to-wit: on November 27, 1928, the appellant (complainant below) filed its bill of complaint against the United States of America and Interstate Commerce Commission praying temporary and permanent injunctions enjoining, restraining and setting aside so much of the order of the Interstate Commerce Commission as required the Railroad Company to establish, put in force and maintain in intrastate commerce within the State of Florida the rates which were prescribed by the Interstate Commerce Commission above mentioned (R. 1). The bill, among other things, asserted that the action of the Interstate Commerce Commission constituted an unlawful invasion of the sovereign rights of the State of Florida reserved to it by the Federal Constitution (R. 12); that the action of the Interstate Commerce Commission constituted an unlawful exercise of power and was without warrant or authority under the Constitution (R. 13); that upon the record before the Interstate Commerce Commission there was no constitutional right or warrant for the exercise of any federal power in derogation of or superior to the State's power with respect to the regulation of intrastate commerce (R. 11); that the order respecting the intrastate rates was beyond the scope of the proceedings (R. 11); that the order was unlawful, arbitrary and unreasonable (R. 11); that the order was void because of its territorial scope (R. 12).

Answers were filed on behalf of the United States and Interstate Commerce Commission (R. 29, 41). The Georgia Public Service Commission intervened in defense of the order of the Interstate Commerce Commission and filed answer (R. 30, 31).

As pointed out above, the appellant's case below, that of Brooks-Scanlon Corporation (Number 494 here) and that of Wilson Lumber Company (Number 495 here) were consolidated for hearing and hearing was had before the specially constituted three-Judge statutory court.

The State contended, both in its bill and at the hearing, that the order of the Interstate Commerce Commission with respect to intrastate rates was State-wide in its scope notwithstanding that by the same report and order the Commission had limited to a small area in North Florida the scope of the proceedings had before it and the primary relief granted by it with respect to interstate rates.

But the Court below, in an elaborate opinion (R. 44), demonstrated by the decisions of this Court that such a construction would probably invalidate the whole order, and therefore, in order to sustain the order, it construed the report and order as prescribing intrastate rates only within the limited territory in North Florida for which interstate rates were prescribed. And the Court having so construed the report and order of the Commission and having examined the other questions raised by the pleadings, in its opinion (R. 44) sustained the order of the Interstate Commerce Commission and afterwards by its decree (R. 52), for the reasons stated in its said opinion, denied the relief prayed and dismissed the bill.

The order of the Commission as thus construed by the trial court was to take effect February 8, 1929. The Atlantic Coast Line Railroad, in disregard of the construction placed upon the order by the trial court, announced its intention of applying intrastate throughout the State of Florida the schedule of rates declared by the Court to be applicable only to the North Florida area.

That Railroad Company had not then intervened in the proceedings in the Court below and proceedings were instituted in the State Court by the State of Florida to enjoin the application of any intrastate rate other than the State intrastate rate, save in the limited area in North Florida, and suits were commenced in the Federal Courts in Florida by the Railroad Company against the Florida Railroad Commissioners to enjoin them from interfering with the application by the Railroad Company state wide in intrastate commerce of the new rate prescribed between all points in Florida by the Interstate Commerce Commis-

sion (Supplemental Bill and Exhibits thereto, R. 61 to 140, inclusive).

The litigation last above referred to is not here material in view of the subsequent order of the Interstate Commerce Commission and the subsequent rehearing by and opinion and decree of the Court below.

While that litigation was pending and one day before the effective date of the order, towit: February 7, 1929, without any notice to the appellant, the Interstate Commerce Commission entered an order the effect of which was to so change its order as of August 2, 1928, as to make the intrastate rate there prescribed applicable "within and throughout the entire State of Florida without exception" (R. 166, 167).

In due course petition for rehearing (R. 52) and supplemental bill (R. 61) were filed by the appellant in the Court below setting up the new fact, to-wit: the amendatory order of the Interstate Commerce Commission, which denied the construction placed by the Court below upon the former order of the Commission.

In due course petition for rehearing was granted, the cause re-opened and leave granted to file the supplemental bill and the Atlantic Coast Line Railroad Company was allowed to intervene in the cause (R. 148). Answers were duly filed to the supplemental bill by the defendants and interveners and in due course rehearing was had before the same trial court. It is here to be noted that at the rehearing the Atlantic Coast Line Railroad Company for the first time objected to the application within and throughout the State of Florida of the State intrastate rate which that Railroad Company had voluntarily established and was voluntarily maintaining.

By its opinion (R. 167-170), filed March 22, 1929, the trial court, notwithstanding its former opinion to the contrary, sustained the power of the Interstate Commerce Commission to prescribe for *intrastate commerce* within and throughout the State of Florida *without exception* the same scale of *interstate rates* which by the same order was prescribed for application in interstate commerce *only* from

points of origin in North Florida to destinations in Georgia. In reaching this conclusion the Court recognized that upon no ground could the order be sustained save upon the theory that the case before the Interstate Commerce Commission was a revenue case, a theory which the trial court, by implication at least, had also denied in its former opinion.

So for the reasons stated in its opinion the Court below by its final decree (R. 170) denied the relief prayed by the bill and supplemental bill and dismissed them.

This cause is before this Court on appeal from that decree.

The assignments of error here relied on for the reversal of the court below are as follows:

The District Court erred:

I.

In denying the relief prayed, and in dismissing the bill and supplemental bill.

II.

In failing and refusing to find that the report and order of the Interstate Commerce Commission of August 2, 1928, as amended February 7, 1929, constitute an unlawful exercise of power by said Commission and are without warrant or authority of or under the Constitution of the United States.

III.

In failing and refusing to find that there is not and cannot be any interstate commerce in logs over the Atlantic Coast Line Railroad from Florida to Georgia destinations on its line.

IV.

In failing and refusing to find that the compulsory

increase of the Florida intrastate rates on logs of the Atlantic Coast Line Railroad Company could not and did not result in the creation of interstate commerce in logs over the Atlantic Coast Line Railroad Company from Florida to Georgia.

V.

In failing and refusing to find that there was no substantial evidence of record before the Interstate Commerce Commission showing or tending to show that substantially similar circumstances and conditions surrounded the transportation of logs by Railroad on the one hand over the Atlantic Coast Line Railroad Company between points in Florida and on the other hand from origins on its line in Florida to destinations in Georgia.

VI.

In failing and refusing to find that there was no issue or controversy under the issues as restricted and defined at the hearing before the Interstate Commerce Commission as to the question that the lower level of the Florida intrastate log rates of the Atlantic Coast Line Railroad Company caused or would cause unjust discrimination against interstate commerce as such in violation of Section 13 of the Interstate Commerce Act.

VII.

In failing and refusing to find that the report and order of the Interstate Commerce Commission as amended are unlawful because said Commission has hereby sought to embrace within the scope thereof all rates of the Atlantic Coast Line Railroad Company on logs between any stations on its line wholly within the State of Florida for any length of haul, not exceeding 170 miles, and in any portion of such State, although there was no case or controversy submitted to that tribunal or pending before it

involving in any way freight rates of the Atlantic Coast Line Railroad Company on logs within Florida, except for hauls of 170 miles and less over such railroad wholly within the so-called northern portion of the State of Florida.

VIII.

In failing and refusing to find that the said order as amended is invalid because of its territorial scope, in that said order as amended fixes the intrastate rates on logs between all points on all lines of the Atlantic Coast Line Railroad Company in Florida, whereas, the intrastate rate investigation in said proceedings before the Interstate Commerce Commission was limited to movements of logs between points on only a portion of the lines of said Atlantic Coast Line Railroad Company located in only a small area situated in northern Florida.

IX.

In failing and refusing to find that there was no evidence whatsoever before the Interstate Commerce Commission supporting or tending to support the conclusion that the continued maintenance of the Florida intrastate log rates of the Atlantic Coast Line Railroad Company would subject interstate commerce to unjust discrimination in violation of Section 13 of the Interstate Commerce Act.

X.

In failing and refusing to find that the report and order of the Interstate Commerce Commission are unlawful because they seek to interfere with the voluntary continuance of the Florida intrastate rates on logs over its line by the Atlantic Coast Line Railroad Company without any substantial evidence showing or tending to show that the continuance of such Florida intrastate log rates in any way violates the provisions of Section 3 or 13 of the Interstate Commerce Act, and without any request or petition by said Atlantic Coast Line Railroad Company by the Georgia Public Service Commission, or by any other party to either the

Interstate Commerce Commission or to the Florida Railroad Commission to increase such Florida intrastate log rates, and without any other effort whatsoever by said Atlantic Coast Line Railroad Company to increase said rate.

XI.

In failing and refusing to find that the report and order of the Interstate Commerce Commission are unlawful because there was no substantial evidence to support the finding that such Florida intrastate log rates are less than reasonably compensatory.

XII.

In failing and refusing to find that the report and order of the Interstate Commerce Commission are unlawful because the facts of record before the Commission do not show that there is or would be any real or substantial injury to or restriction upon interstate commerce as a consequence of the continued maintenance of the Florida intrastate log rates of the Atlantic Coast Line Railroad Company.

XIII.

In failing and refusing to find that the report and order of the Interstate Commerce Commission constitute an unlawful invasion of the sovereign rights of the State of Florida reserved to it under the Constitution of the United States and of the citizens of the State of Florida and is without any warrant or authority of or under the Constitution of the United States, and, further that said Interstate Commerce Commission was and is without jurisdiction to enter said report and order.

XIV.

In failing and refusing to find that the issue as to

whether the lower level of the Florida intrastate log rates of the Atlantic Coast Line Railroad Company cause or would cause unjust discrimination against interstate commerce in violation of Section 13 when construed with Section 15a of the Interstate Commerce Act, was eliminated from the proceeding before the Commission by the parties thereto.

XV.

In failing and refusing to find that the intrastate rates, investigated by the Interstate Commerce Commission, were not those contemplated by Section 13 (4) of the Interstate Commerce Act, as amended, because same were voluntarily initiated by the carrier, and therefore not "made or imposed by authority of any State", within the description of Section 13 (3) of said Act.

XVI.

In failing and refusing to find that the report and order of the Interstate Commerce Commission as amended are unlawful because there were no facts of record in such proceeding before the Interstate Commerce Commission showing, or tending to show, nor did the Interstate Commerce Commission find and facts sufficient to constitute unjust discrimination against interstate commerce in violation of the provisions of Section 13 of the Interstate Commerce Act.

XVII.

In holding that the order of the Interstate Commerce Commission of August 2, 1928, as amended on February 7, 1929, was within the issues sought to be investigated by said Commission.

XVIII.

In holding that said order of the Interstate Commerce Commission was made after full hearing by said Commission.

XIX.

In holding that the report and order of the Interstate Commerce Commission raising the State rate of the Atlantic Coast Line Railroad Company over its entire system in Florida on logs is justified in order to remove discrimination against general interstate commerce in that said Florida intrastate log rates are so low as to throw an undue burden on the revenues arising from interstate commerce.

XX.

In holding that "there was no territorial limitation in the complaint. No such limitation was put on the inquiry by any subsequent amendment or by any order of the Commission. * * * The rate was therefore in issue for all the purposes of Section 13, although there was no express prayer for its enhancement, and no express allegation that it was unprofitable to the carrier."

XXI.

In holding that "in rejecting the conclusion of slight net income asserted by the witnesses, the Commission did not rule out the basic facts shown, but was at liberty to supplement them and construe them for itself, and make its own conclusion from them."

XXII.

In holding that the Interstate Commerce Commission, in reaching its conclusion respecting the Florida intrastate

rates on logs, was entitled to rely upon "the common knowledge and skill in rate matters that the Interstate Commerce Commission, the Georgia and Florida State Commissions, and the railroads must have in such matters."

XXIII.

In the holding that "on the face of things the log rate is too low, and likely to burden the carrier."

XXIV.

In holding that "we cannot say that the order is without evidence to sustain it, on the ground that the former state rate was an undue discrimination against general interstate commerce over the Coast Line Railroads."

XXV.

In holding that the complainants in their reply to the exceptions of said Georgia Public Service Commission to the report of the examiner of the Interstate Commerce Commission failed to contend that the finding of said report with respect to the burdensomeness of said rate was foreign to said investigation.

XXVI.

In holding that the complainants in their application for a rehearing before the entire Interstate Commerce Commission failed to contend that the burdensomeness of the Florida intrastate rate was foreign to the investigation had by said Interstate Commerce Commission.

XXVII.

In failing to suspend, annul and permanently enjoin the Commission's order of August 2, 1928, as amended from time to time in order to extend the effective date

thereof, and as changed in language for the purpose of clarification on February 7, 1929, insofar as said order applied to rates on the intrastate transportation of logs in Florida.

The Interest of the State of Florida in the Case at Bar.

The interest of the State of Florida in the case at bar is in protecting its sovereignty from the unconstitutional, unlawful, arbitrary and oppressive exercise of the Federal power resulting from the State-wide order of the Interstate Commerce Commission.

Summary of the Questions to be Discussed in this Brief.

As has been stated above, the three causes here on separate appeal were consolidated for the purpose of hearing by the court below and are here upon a common record. Careful and elaborate briefs are being filed by the appellants in the two cases which are companion to the case at bar in this court. The arguments made and authorities cited in those briefs are common to the State of Florida as well as to the appellants upon whose particular behalf they were filed. The State of Florida relies upon the several points made and the authorities cited in those briefs and now asks that it may have the benefit of them without the unnecessary repetition of them in this brief. In the particular discussions in this particular brief we propose to confine ourselves to the aspects of the proceedings in the Interstate Commerce Commission and in the court below which are particularly applicable to the relative rights of the State and National Governments under the Constitution, the laws of Congress, and the decisions of this Court, avoiding duplication of the matter contained in the other briefs as far as possible. Those relative rights will be discussed under the following headings:

Point 1. The Primary issue before the Commission was the interstate rate; the intrastate rate was involved only incidentally in its relationship to the interstate rate.

Point 2. The proceedings before the Interstate Commerce Commission were adversary proceedings of limited scope in which it was unlawful for the Commission to exercise power under Section 13 (4) in its relation with Section 15-a.

Point 3. It was unlawful for the Interstate Commerce Commission to exercise Federal power with respect to intrastate rates beyond the sphere in which interstate rates were prescribed.

Point 4. The proceeding was not appropriate nor was the hearing sufficient.

Point 5. The power of the Commission to fix intrastate rates was challenged throughout.

Point 6. Neither the showing before the Interstate Commerce Commission nor the investigation made by it was sufficient to warrant the Commission in imposing its will upon a sovereign State statewide and without exception.

Point 7. An order of the Interstate Commerce Commission must be set aside even when in form within the delegated power if it is shown that in substance there has been a mis-use or abuse of the power delegated.

Point 8. Comparison of the case at bar with the Wisconsin Rate Case, 257 U. S. 563, 66 L. Ed. 371, demonstrates that the prerequisites present in the Wisconsin case for superseding the State Power statewide are absent here.

POINT 1.

> The primary issue before the Commission was the interstate rate; the intrastate rate was involved only incidentally in its relationship to the interstate rate.

The defendant carrier, the Atlantic Coast Line Railroad Company, has approximately 2,200 miles of track in Florida (R. 154) the intrastate commerce over all of which is subject to regulation by the State of Florida under its

reserved powers. The Interstate Commerce Commission in its report (R. 792) found as a fact:

> "While the complainant assails the rates from all points on defendant's lines in Florida to all points on its lines in Georgia the record shows that insofar as the interstate rates are concerned relief is desired only with respect to rates on logs, except walnut, cherry and cedar, from that portion of Florida lying north of and including Jacksonville, Gainesville, Burnett's Lake and High Springs, hereinafter referred to as north Florida, to destinations in Georgia for distances not exceeding 170 miles."

Accordingly the Interstate Commerce Commission prescribed interstate rates only from the limited area of north Florida as above defined, for distances not exceeding 170 miles.

A line connecting the four points named in the order of the Interstate Commerce Commission would constitute an irregular crescent the northernmost portion of which would be approximately 35 miles from the Georgia boundary at Jacksonville and the southernmost of which would be about 60 miles from the Georgia boundary at Gainesville.

Drawing a line intersecting the southernmost of the four points named above east and west across the State of Florida from the Gulf of Mexico to the Atlantic Ocean, less than one-fourth of the Florida mileage of the defendant carrier lies north of such line. Less than one-eighth of the defendant carrier's Florida lines extend northwardly from the four points in question. The southernmost point on the defendant carrier's lines in Florida is nearly 300 miles south of Gainesville.

Thus, insofar as interstate rates were concerned, there was at least three-fourths or more than 1,600 miles of the defendant carrier's Florida lines upon which the Federal power was not imposed in that proceeding because, said the Commission in effect, no relief was desired as to that.

Of course, when it came to the prescribing of the in-

terstate rate the Interstate Commerce Commission was wholly within its own domain and was limited only by its own judgment, the evidence, and the scope of the relief sought, and the latter the Commission found to be limited as above stated.

But when it came to the invasion of that domain which is primarily the domain of the State, to-wit, intrastate rates, the Interstate Commerce Commission was not content to limit its field of operation to the one-eighth or one-fourth of the defendant carrier's lines which were covered by the interstate order but reached out and prescribed intrastate rates for every foot of the 2,200 miles of rails in Florida and ordered the defendant carrier to put in force and maintain the prescribed intrastate rates, "within and throughout the State of Florida without exception".

Not only was the territorial scope of the intrastate part of the order more than three times or more than six times (as the case may be) as broad as the interstate order but there was no "saving clause" of any kind, character or description in it. The evident purpose and intent of the order as finally "clarified" was to take from the State every vestige of its sovereign power with respect to the regulation of intrastate rates between all stations on the defendant carrier in Florida under all circumstances and under all conditions "without exception".

And this action was taken against a State rate which was shown by the record to have been voluntarily initiated by the carrier and voluntarily maintained by it for nearly fifteen years without any complaint, directly or indirectly, to the State with respect to it, and no attempt to increase it in this proceeding. And this was done not pursuant to the Interstate Commerce Act, as amended by the Transportation Act of 1920, but in violation of the terms, intent and meaning of the Act as amended and in violation of the plain terms of the Federal Constitution.

POINT 2.

The proceedings before the Interstate Com-

merce Commission were adversary proceedings of limited scope in which it was unlawful for the Commission to exercise power under Section 13 (4) in its relation with Section 15a.

As has been pointed out above the proceedings before the Interstate Commerce Commission were adversary proceedings initiated by the complaint in which the Georgia Public Service Commission was sole plaintiff and the defendant carrier was sole defendant.

The Court below sustained the order respecting *intrastate* rates upon the sole ground that the complaint before the Commission had sufficiently invoked the powers of the Interstate Commerce Commission under Section 13 (4) of the Interstate Commerce Act as amended, and Section 15-a of the same Act, to authorize that Commission to enter the state-wide order in question.

We submit that there was no basis laid either in the pleadings or in the proofs for invoking this extraordinary power under the "dovetail relations" of Sections 13 (4) and 15-a of the Interstate Commerce Act. We say that the revenue power was never involved at all in the proceedings. And we say further that even if it were brought in question, it was in such a remote and incidental way as to make the exercise of that power an arbitrary and unlawful act on the part of the Interstate Commerce Commission. An examination of the complaint (R. 193) leaves not the slightest doubt that the thing brought in issue was the level of the Florida *Interstate* Rate, north-bound from Florida to Georgia and that incidental to that primary issue was the subordinate issue of the relationship between the *interstate* rate and the *intrastate* rate.

It is true that in a single paragraph of the complaint (Par. 11, R. 196), the complainant in one and the same sentence charges that the Florida rate gives undue and unreasonable preference and advantage to *intrastate* shippers in Florida and are unduly prejudicial and disadvantgeous to shippers in Georgia and cause undue, unreasonable and

unjust discrimination against *interstate* commerce in violation of Section 13 of the Act.

But upon the face of this paragraph alone it is patent that this bare conclusion of law is asserted incidentally to the *preferential* and *prejudicial* feature of the complaint and is not supported anywhere by any allegation that the Florida *intrastate* rates are too low or are unreasonable or in any way burden the revenue of the carrier. On the other hand with respect to the *interstate* rates by Par. 10 of the complaint (R. 196) they are expressly asserted to be *unjust* and *unreasonable* and that attack is supported by numerous and detailed averments of fact throughout the complaint. The primary relief asked by the prayers of the complaint is the establishment of reasonable, non-discriminatory and non-prejudicial *interstate* rates which shall be no higher than the rates concurrently in effect *intrastate*. All other relief prayed is incidental to the primary relief sought. No relief whatsoever is prayed with respect to the level of the intrastate rates.

That this is true is clearly demonstrated by the conduct and statements of the complainant and the defendant during the course of the proceedings. Not one time but several times Mr. Price, rate expert of, chief witness for, and associate counsel of the Georgia Commission in the proceedings before the Examiner in terms made it clear that the end sought to be achieved by the proceedings was the extension of the then effective *intrastate* rate *interstate* into Georgia (R. 417, 418, 419). He also declared in terms that the proceeding was "not a revenue case" (R. 417) and the Chairman of the Georgia Commission who was its chief counsel by statements of record (R. 421) took this same position.

As has been shown, the defendant by its answer defended both rates within the sphere of their operation and demanded dismissal of the complaint (R. 199, 200).

While the defendant carrier proposed a scale of rates for *interstate* application it expressly declared that it made no proposal for *intrastate* rates (R. 495) and the report of the Commission itself finds that the carrier in that proceed-

ing before the Commission made no attempt to increase the *intrastate* rate (R. 794).

Not only is it true that the Interstate Commerce Commission did not make an order as it might have done under Section 15-1 of the Act extending the scope of the proceedings, but by its orders permitting intervention expressly prohibited the broadening of the scope of the proceedings (Typical R. 209).

We submit, therefore, that the analysis of the complaint and answer, and the consideration of what was said and done by that complainant and the principal defendant under it, leaves no doubt that the primary issue was the level of the *interstate* rate, and that the *intrastate* rate was involved only incidentally, and then only with respect to its relationship with the *interstate* rate.

But, if there were any doubt upon that subject, the decisions of this Court required that doubt to be resolved against the exercise of the Federal power in derogation of the State power. This Court has held more than once that ambiguity in an Act of Congress affecting the relative powers of the National and State governments must be resolved against the Federal power and in favor of the State power, and has applied the same rule even more rigorously to orders of the Interstate Commerce Commission.

> Illinois Central R. R. Co. v. Public Utilities Commission, 245 U. S. 491; 62 L. Ed. 425, (1918).

Of course, the same rule would apply in determining whether the powers of the Interstate Commerce Commission have been lawfully invoked and exercised in pleadings filed and proceedings had before the Commission.

POINT 3.

It was Unlawful for the Interstate Commerce Commission to Exercise Federal Power with Respect to Intrastate Rates Beyond the Sphere in which Interstate Rates were Prescribed.

The complaint and the proceedings before the Interstate Commerce Comission clearly show that the relief sought by the Georgia Commission with respect to intrastate rates (whatever that relief may have been) was not independent relief but dependent relief and incidental to and co-terminous with the primary relief sought, to-wit, the establishment of reasonable interstate rates. And the Commission having found that the primary relief sought, to-wit, the establishment of reasonable interstate rates, was limited to the small area in north Florida and having confined the exercise of the direct Federal power to that small area alone it was unlawful for that Commission to exercise the incidental Federal power beyond the limits of the area in which the direct power was exercised. And the power under section 13 in its "dovetail relation" with section 15-a of the Interstate Commerce Act is not a *direct* power but is an *incidental* power, and while it is exercised under different circumstances it is in its essence the same power that was invoked in the original Shreveport case.

Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co. 257 U. S. 563, 66 L. Ed. 371.

Colorado v. United States, 271 U. S. 153; 70 L. Ed. 878.

And it is to be conclusively presumed that Congress did not intend this incidental power to be exercised with respect to intrastate rates except (a) in territory where the direct Federal power with respect to interstate rates and rate levels has been exercised, and (b) where a *substantial* evil has been clearly shown to exist, and (c) then only to the extent that it is necessary to remedy the particular evil in the particular case in hand. And so having neither considered nor fixed the level of the interstate rates for application elsewhere than the small area in north Florida, it is unthinkable that the Interstate Commerce Commission should possess or exercise the incidental power to fix "without exception" the intrastate rates "within and throughout" the vast area and over the vast mileage not included in its interstate order.

And particularly is this true when we consider that

the complainant in the proceedings before the Interstate Commerce Commission, the State of Georgia, and other states in the Southeastern group were shown by the evidence of the Georgia Commission itself (R. 394-395) to have materially lower intrastate rates than the rate so prescribed State-wide for Florida; and that Georgia and the other States included by the Interstate Commerce Commission in the "Southeastern group" are left free and untrammeled to regulate their intrastate log rates.

POINT 4.

The Proceeding was Not Appropriate Nor was the Hearing Sufficient.

We have shown that the thing primarily in issue was the level of the interstate rate, and that the intrastate rate was only involved in a subordinate way under the incidental power of the Interstate Commerce Commission. We have shown that the Commission found as a fact that relief sought as to the interstate rate (the primary issue) was confined to the small area in north Florida, and that the Commission limited the relief granted to that small area.

The proceeding was brought for the benefit of Georgia shippers who could have no interest, direct or indirect, in the application of Section 15-a of the Act. Only a single carrier was impleaded. We insist that it was never the intention of Congress by Section 13 (4) of the Act or otherwise, to empower the Commission to enter any order prescribing intrastate rates statewide without exception in any such proceeding as this. During the proceeding before the Commission and prior to the conclusion thereof, the Commission under the power expressly conferred by Section 15-1 might have made "an order for investigation and hearing * * * in extension of" (the pending complaint). This the Commission did not do. The fact that it was expressly authorized by the Act to enter an order "in extension of any pending complaint" implies that such an order is *necessary* where the nature of the complaint is inappropri-

ate to the extended investigation. Indeed, the Commission not only did not exercise this power, but in the various orders permitting intervention, permitted them upon express condition that the issues be not broadened.

The rules laid down by the Interstate Commerce Act with respect to the procedural and substantive rights of persons called before it, as well as the Constitution itself, guarantees to such persons due process of law. And the Commission, in the exercise of quasi-judicial power is bound, just as any other tribunal acting in a quasi-judicial capacity is bound, to observe "those general rules established in our system of jurisprudence for the security of private rights". Hagar vs. Reclamation District No. 108, 111 U. S. 701, 28 L. Ed. 569.

In the Hagar case the Court said:

> "It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought."

The investigations authorized under the "provisions of this Act" are manifold and the various kinds of relief authorized by the Act are numerous.

Among various other things they include rates, fares, charges, classifications, regulations, practices, etc. It is manifest therefore, that the Act itself, as well as organic law, contemplates that every investigation in every proceeding and every hearing shall be adequate and appropriate to the particular proceeding in hand. This being true, it is obvious that a proceeding, investigation and hearing adequate and appropriate to one particular thing may be utterly inadequate and inappropriate to another particular thing which may otherwise be within the jurisdiction of the Commission.

Therefore, we say that the Interstate Commerce

Act contemplating as it does different kinds of proceedings and different kinds of hearings and different kinds of relief to be afforded thereon, did not contemplate that state sovereignty be brushed aside save in a proceeding which was plainly appropriate and adequate to that end nor unless nor until it had been made "clearly manifested" in such proceeding and at such hearing that it was necessary for the protection of Interstate Commerce for the state power to be superceded.

We submit that the only appropriate proceeding for the entry of an order prescribing intrastate rates for application "within and throughout" a state "without exception" is in a direct attack upon the level of the intrastate rate in a proceeding instituted either (a) upon the petition of the carrier, or (b) upon an order of the Commission entered for that purpose itself either instituting such proceeding or extending the scope of a pending complaint for that purpose.

But even if it be conceded that the "new power" conferred upon the Commission by Section 13 (4) authorizes the Commission in conjunction with its duty under Section 15-a of the Act, to prescribe intrastate rates in a proceeding where the level of the interstate rate was the primary issue, then it might be conceded that under the incidental power, upon sufficient hearing and sufficient evidence the state rate might be fixed within the field of operation in which the interstate rate was fixed; but it is manifest that an intrastate order statewide "without exception" is not appropriate to a proceeding where the primary "relief desired" and granted covered only a small portion of the state.

Any other rule than that above stated would be oppressive of both the state power and the rights of private parties. For that would mean that in *any proceeding* involving primarily the level of an interstate rate, fare, charge, classification, regulation or practice in any portion of a state however small the intrastate rate, fare, charge, classification or practice (any or all) prevailing hundreds of miles distant from the field of operation of the primary relief sought might be regulated as an incident to the exercise

of the primary power; and thus no state and no man would be secure in their respective rights and the protective features of the Constitution and of the Act itself would be destroyed.

POINT 5.

The Power of the Commission to fix Intrastate Rates was Challenged Throughout.

The District Court on the rehearing seemed to think that the appellants in some way had recognized that the hearing was full because, so said that Court in effect, after the examiner had found that the Florida intrastate rates were not unremunerative nor burdensome, the appellants discussed that finding in their reply to the exceptions of other parties to the examiner's report and did not contend that such evidence was foreign to the investigation. Also, because, so said the Court in effect, after the Division 4 had made its order and when the appellants demanded of the whole Commission a re-consideration and a rehearing upon the order, the appellants did not ask for an opportunity to present further evidence and merely asked (*sic*) for a reargument on the evidence already taken. Before discussing what was said in the documents referred to we may say that in no such way as this can sovereign state power and rights be waived nor power conferred upon the Commission which it has neither under the Constitution nor under the Act.

In its reply to the exceptions to the examiner's report, appellants did discuss the evidence therein referred to and did not at that time and in that document expressly declare that that evidence was foreign to the investigation. At that time no living person could have assumed the remote possibility that the Commission would attempt to exercise its incidental power respecting intrastate rates in a broader field than that in which relief was "desired" with respect to the level of interstate rates, the primary issue. Indeed, the trial court in its first opinion declined

to believe that the Commission had done so. With respect to the petition for reconsideration and rehearing filed by the appellants before the whole Commission after the order had been rendered by Division 4 of the Commission, this Court will observe that these appellants in terms asserted that the intrastate order was beyond the scope of the proceeding, was without lawful foundation, was an unwarranted invasion of the sovereign rights of the state, and was not supported by any competent evidence (R. 842, 856, 860, 861).

But this is not all; at the conclusion of the complainant's evidence, the appellants filed a written motion (Side R. 210, 467) expressly challenging the power of the Commission and the sufficiency of the evidence, and expressly reserving its rights in that connection. Again, at the conclusion of the defendant's evidence (R. 562) this challenge was asserted and an announcement was made that any testimony offered by the appellants was without prejudice to that motion. Again, the Commission's own report (R. 792) shows that this challenge was insisted upon at the hearing before Division 4. And so we say there was no recognition, express or implied, of the power of the Commission to enter a statewide order respecting intrastate rates or any affirmative or other order with respect to such rates.

POINT 6.

Neither the Showing before the Interstate Commerce Commission Nor the Investigation made by it was Sufficient to Warrant the Commission in Imposing its Will upon a Sovereign State Statewide and Without Exception.

The primary control of and jurisdiction over intrastate rates is, of course, within the reserved powers of the State; and the Transportation Act, 1920, recognizes that fact by the re-enactment of the proviso with respect to the

regulation of traffic "wholly within a state".

It is axiomatic that *any* order of the Commission, even one involving only the exercise of the direct power with respect to interstate rates must fall unless it is supported by substantial evidence actually, physically present before the Commission in that particluar proceeding.

> Interstate Commerce Commission v. Louisville and Nashville R. Co. 227 U. S. 88, 57 L. Ed. 431.

We insist that not only was there no substantial evidence before the Commission upon which to base the intrastate order statewide and "without exception" but that there was no sufficient investigation and no evidence upon which to base any such order.

We submit that the very report of the Commission itself implies that this is true when it says (R. 792):

> "While the complaint assails the rates from all points on defendant's lines in Florida to all points on its lines in Georgia the record shows that insofar as the interstate rates are concerned relief is desired only with respect to rates on logs * * * from that portion of Florida lying North of and including Jacksonville, Gainesville, Burnett's Lake and High Springs, hereinafter referred to as north Florida, to destinations in Georgia for distances not exceeding 170 miles".

The level of interstate rates being the primary thing in issue and the Commission in its formal order prescribing rates having condemned the intrastate rate only with respect to its *relationship* to the interstate rate, it seems obvious from the report of the Commission itself "that the record shows" that the investigation by the Commission and the evidence before the Commission with respect to the subject matter of the investigation were limited to the small area in north Florida.

But, before the Commission, a subordinate tribunal of the Federal Government, can supersede the state power and impose its will upon the state within and throughout the state "without exception" there must be demonstrated to it

and be demonstrable by it something more than is required by the so-called "substantial evidence" rule applicable to orders made by the Commission in the exercise of the direct Federal power respecting interstate rates.

It was not the intent of Congress that the rights of the sovereign states should be finally concluded by a subordinate Federal body by the application of any such rule as the so-called "substantial evidence" rule.

On the contrary, we insist that the broad principles enunciated by this Court clearly demonstrate that whenever and wherever there is doubt whether the Federal power should be exercised so as to supersede the state power in matters affecting intrastate commerce that doubt must be resolved against the Federal power and in favor of the state power.

Under the decisions of this Court doubtful or ambiguous provisions of an Act of Congress itself with respect to the exercise of Federal power in derogation of State power under the commerce clause, are construed against the Federal power and in support of the reserved power of the states. The congressional intent to supercede the state power must be "clearly manifested". Even a more rigid rule is applied with respect to orders of the Interstate Commerce Commission, the subordinate body. Not only must the intent to supersede state power there be "clearly manifested" but those orders must conform to "a high standard of certainty".

> Illinois Cen. R. R. Co. v. Public Utilities Com., 245 U. S. 493, text 510, 62 L. Ed. 425, text 438.
>
> American Express Co. v. South Dakota, 244 U. S. 617, text 625, 61 L. Ed. 1352, text 1358.
>
> Railroad Com. of Wisconsin v. Chicago, B. & Q. R. R. Co., 257 U. S. 563, text 580, 66 L. Ed. 371, text 380.

Since the Acts of Congress are to be so construed that every intendment is against the exercise of the Federal power when in derogation of the state power it is obvious that Congress neither by the Transportation Act, 1920, or

otherwise, *intended* that the Interstate Commerce Commission should exercise the Federal power in derogation of the State power except and unless the evidence actually before the Interstate Commerce Commission "clearly manifested" to a "high standard of certainty" that the particular case in hand actually fell within the class in which the Commission by the Act of Congress is authorized to exercise the Federal Power.

And among the things which must be "clearly manifested" to a "high standard of certainty" is that there is "a real discrimination against and obstruction to interstate commerce". Wisconsin case, supra.

We confidently assert that not only does the record here show that these jurisdictional matters were not "clearly manifested" to "a high standard of certainty", but shows that there was no sufficient investigation and substantial evidence whatever to support the order.

POINT 7.

An Order of the Interstate Commerce Commission Must Be Set Aside Even When in Form Within the Delegated Power if it is Shown that in Substance there has been a Misuse or Abuse of the Power Delegated.

The principle asserted in the foregoing caption is well sustained by the decisions of this Court.

Interstate Com. Com. v. Union P. R. Co. 222 U. S. 541, text 547.

The intent of Congress as ascertained from the terms of the Act is the thing that is the law. Section 13 of the Interstate Commerce Act makes elaborate provision for conferences and joint hearings between the Commission and the state authorities having jurisdiction over carriers which are made subject to the provisions of the Interstate Commerce Act. This Court has condemned in no uncertain

terms harsh and unnecessary exercise of Federal power in derogation of the state power.

Lawrence v. St. Louis, San Francisco Ry. Co. 274 U. S. 588, 71 L. Ed. 1219.

In the case at bar the Interstate Commerce Commission merely gave the usual notice to the State of Florida and disregarded every other provision of Section 13 with respect to co-operation with and deference to state authority. It did not confine the scope of the intrastate order to the limited field of operations of the interstate order; it did not fix a maximum alone or a minimum rate alone; it did not order a general or special investigation of the level of the intrastate rate; on the contrary, the thing that the Commission did was to enter an order requiring the carrier to put in force and *maintain* a particular intrastate rate within and throughout the state of Florida *without exception,* thus leaving no field of operation whatsoever for the exercise of the state power under any circumstances or under any condition.

We submit that such drastic action was contrary to the intent of Section 13 of the Act as amended, and even if within the form of delegated power is so far beyond the substance as to be an arbitrary abuse of power which this Court will not sustain.

POINT 8.

Comparision of the Case at Bar with the Wisconsin Rate Case, 257 U. S. 563, 66 L. Ed. 371, Demonstrates that the Prerequisites Present in the Wisconsin case for Superseding the State Power Statewide are Absent Here.

This great case and its companion case, the New York case (257 U. S. 591) were relied upon by the court below in sustaining the order of the Interstate Commerce Commission. We here submit, as we submitted below, that not

only are those cases no authority for the anamolous order entered by the Commission, but under the broad principles laid down in them and particularly in the Wisconsin case the order must be enjoined.

We will now consider in parallel columns the fundamentals of these two cases.

WISCONSIN CASE.	CASE AT BAR.
(a) The Wisconsin case was a general investigation initiated by the Interstate Commerce Commission itself where the level of the State fares was the direct and sole issue.	(a) The case at bar was initiated by a complaint primarily directed against the level of the interstate rate, and the intrastate rate was involved only incidentally in its relation to the interstate rate. The sole complainant was the State of Georgia and the complaint was brought solely on behalf of Georgia shippers.
(b) All the interstate carriers within Wisconsin were named as respondents and the order prescribed the same level of intrastate rates for all of the interstate carriers within the State.	(b) A single carrier was made party defendant and relief was sought only against that single carrier, and the intrastate rate of that carrier alone was affected by the order notwithstanding that other carriers in Florida were shown to have numerous different kinds of intrastate log rates including point to point rates which were different from the intrastate rate of the defendant carrier.
(c) In the Wisconsin case it was shown that the State	(c) The record here shows that the State rate was vol-

rate had been imposed by the mandatory requirement of a State statute and that the carriers had made application to State authority to increase their intrastate rates to the level of the general interstate rate which had been prescribed Statewide throughout Wisconsin and throughout the carrier group and that the State authority had refused to grant any relief.

untarily put into effect by the carrier and voluntarily maintained for nearly 15 years (except for the horizontal increases) and that at no time and no place had the carrier applied to State authority for any modification of it and that no modification of it was sought by the defendant carrier in the proceedings before the Interstate Commerce Commission.

(d) The Interstate Commerce Commission found as a fact from the evidence before it that the interstate rate (shortly theretofore prescribed by the Commission for all interstate carriers *throughout* Wisconsin and throughout the carrier group) was necessary to fulfill the requirement as to *net income of that particular railroad group* under Section 15a of the Act.

(d) No such finding here. No evidence upon which it could have been made and no investigation of any kind with respect to it.

(e) The Interstate Commerce Commission from the evidence before it found as a fact that the net difference in the income of all the Wisconsin carriers which would be occasioned by the continued maintenance of the State

(e) There was no finding that the interstate rate prescribed would increase the net income of the defendant carrier in any particular sum or in any sum whatsoever and no evidence before the Interstate Com-

rate was approximately Six Million Dollars.

merce Commission upon which any such finding colud be made, and no investigation of any kind with respect to it.

(f) In order to have made findings (d) and (e) above the Interstate Commerce Commission must have had before it in that proceeding substantial evidence (1) with respect to the value of the property of all the carriers in the group, and (2) the gross and net income both by group and within the State.

(f) No evidence whatsoever with respect to the value of railroad property by group or otherwise. The only evidence here with respect to income at all was the gross income for one month from log and certain other low grade traffic over the Atlantic Coast Line System (R. 287), and an exhibit introduced by the complainant Georgia Public Service Commission showing in brief the gross and net operating revenue of the Atlantic Coast Line system for specified years (R. 396), and that was introduced by the complainant for the express purpose of showing that there was no "financial necessity for increased rates" (R. 704).

(g) The exercise of the *new power* conferred by Section 13 (4) of the Act was held lawful because of the findings made under Section 15a of the Act in the performance of the duty imposed by Section 15a.

(g) Here there are no findings under Section 15a and no evidence upon which it could be based, no basis laid upon which such findings could be predicated and indeed it nowhere appears that Section 15a was involved, directly or remotely.

(h) There was the customary "saving clause" so frequently held by this Court to be so important in construing orders of the Interstate Commerce Commission which might otherwise be bad.	(h) There is here no "saving clause" but the carrier is required to put in force and maintain "within and throughout the State of Florida without exception" the interstate rate prescribed by the Commission from the small area in North Florida.

The foregoing comparison of the fundamentals of the Wisconsin case and those of the case at bar demonstrate how wholly different are the two.

We submit that every fundamental shown above to be present in the Wisconsin case and absent in this case was material to the decision in the Wisconsin case made as it was under the "dovetail relation" of Section 13 (4) and Section 15 (a) of the Interstate Commerce Act.

The decision in the Wisconsin case is no authority for the decision of the court below. Indeed, the careful and painstaking statement of this Court of the substantive and procedural elements and findings of the Commission present there (as shown above) and so patently absent in this case, warrant the inference that the decision in the Wisconsin case would have been different had those things missing here been missing there.

We rely upon the Wisconsin case because of the inference drawn as to the inappropriateness of the proceeding, the insufficiency of parties, the want of fundamental findings, evidence and investigation shown above to be absent in this case.

We also rely upon it because of its statement of the law with respect to the exercise of the State and Federal powers within their respective domains. Having sustained the order of the Interstate Commerce Commission there involved the Court said, 257 U.S., text 590, 591:

> "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of main-

taining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination (591) against, and obstruction to, interstate commerce, *and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce.*" (italics ours)

As has been shown, the level of the interstate rate in the proceeding at bar was fixed only for the small area in north Florida. No "general level" of interstate rates was or has been fixed (a) either elsewhere in Florida other than in "north Florida", or (b) on any carrier doing business in Florida other than the Atlantic Coast Line Railroad.

No *discretion*, appropriate or otherwise, has been left to the State Government to deal with intrastate rates in any particular, for the intrastate order prescribed the rates "within and throughout the State of Florida without exception".

We submit that under these circumstances the order in question is in direct conflict with the principles expressly laid down in the Wisconsin case as well as in conflict with the principles to be inferred from it.

We rely upon the principles of constitutional and governmental law laid down in the Wisconsin case for a reversal of the case at bar.

CONCLUSION.

More is involved here than the wrong done to the sovereign rights of the State of Florida in this proceeding by the Interstate Commerce Commission in depriving that State of every vestige of power with respect to rates on logs within and throughout the State of Florida "without exception".

The great principle here involved is whether the Interstate Commerce Commission shall exercise direct and unified control over all the intrastate rates and concerns of the carriers to the entire exclusion of the state authority "without exception".

More than that is here involved, for there is here involved the question of whether that direct and unified control may be exercised by the Commission within a field where the Federal power over interstate rates has not been exercised. More than that is here involved; there is involved here the question of whether the Commission may exercise that control under the circumstances above set forth in a backhanded way in a proceeding involving the intrastate rate only incidentally and only in its relation to the interstate rate, and in a proceeding where it affirmatively appears that the state rate was voluntarily imposed and maintained by the carrier and no application was ever made to the state authority to modify or alter that state rate.

We submit that under the Federal Constitution, the laws of Congress, and the decisions of this Court, the intrastate order must go down.

Respectfully submitted,

FRED H. DAVIS,

Attorney General of Florida.

APPENDIX.

STATUTES RELIED UPON.

The Interstate Commerce Act, (41 Stat. L., 474):

Section 1:

(1) That the provisions of this Act shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

(c) The transmission of intelligence by wire or wireless;—

from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.

(2) The provisions of this Act shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

(b) To the transmission of intelligence by wire or wireless wholly within one State and not transmitted to or from a foreign country from or to any place in the United States, as aforesaid; or

(c) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this Act except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(5):

"All charges made for any service rendered or to be rendered in the transportation of * * * property * * * shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 2:

That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substan-

tially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

Section 3 (1):

"That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 13 (1):

"That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint,

it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

Section 13 (2):

"* * * The Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money."

(3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by

it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the co-operation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and the interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary nothwithstanding.

Section 15 (1):

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge

whatsoever demanded, charged or collected, by any common carrier or carriers subject to this Act for the transportation of * * * property * * * as defined in the first section of this Act, * * * is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged * * * and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect, any rate, fare or charge, for such transportation * * * other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be * * *."

Section 15a (2):

"In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management, and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation. Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to pre-

scribe different rates for different sections of the country."

Section 15a (3):

"The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided,* That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account."

Section 15a (4):

"For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a

of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value."

Section 15a (5):

"Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States."

Section 15a (6):

"If, under the provisions of this section, any carrier, receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purposes of this paragraph the value of the railway property

and the net railway operating income of a group of carriers. which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole, irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory Act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4)."

The District Court Jurisdiction Act (C. 32, 38 Stat. L., 219):

"The Commerce Court, created and established by the Act entitled 'An Act to create a Commerce Court and to amend the Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes,' approved June eighteenth, nineteen hundred and ten, is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment * * *.

The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not

relate to transportation, or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportaton relates to a through shipment, the term 'destination' shall be construed as meaning final destination of such shipment.

The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States; and the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court. No interlocutory injunction suspending or restraining the enforcement, operation or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney

General of the United States, and to such other persons as may be defendants in the suit; *Provided*, That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges, concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be

taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice required shall be served upon the defendants in the case and upon the attorney general of the state. All cases pending in the Commerce Court at the date of the passage of this Act shall be deemed pending in and be transferred forthwith to said district courts except cases which may previously have been submitted to that court for final decree and the later to be transferred to the district courts if not decided by the Commerce Court before December first, nineteen hundred and thirteen. * * *."

The Commerce Court Act (C. 309, 36 Stat. L., 539):

"Sec. 1. That a court of the United States is hereby created which shall be known as the Commerce Court and shall have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds:

First. All cases for the enforcement, otherwise then by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission.

Third. Such cases as by section three of the Act entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a circuit court of the United States.

Fourth. All such mandamus proceedings as under the provisions of section twenty or section twenty-three of the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-

seven, as amended, are authorized to be maintained in a circuit court of the United States.

Nothing contained in this Act shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the Commerce Court.

The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this Act shall not affect the jurisdiction now possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes."

"Sec. 211. That all cases and proceedings in the Commerce Court which but for this Act would be brought by or against the Interstate Commerce Commission shall be brought by or against the United States, and the United States may intervene in any case or proceeding in the Commerce Court whenever, though it has not been made a party, public interests are involved."

"Sec. 212. That the Attorney General shall have charge and control of the interests of the Government in all cases and proceedings in the Commerce Court, and in the Supreme Court of the United States upon appeal from the Commerce Court. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: *Provided*, that the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an

order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suits: *Provided, further,* That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of this Act, or the Acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof, and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General therein.

"Sec. 213. Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel and under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States."

Act of February 13, 1925 (C. 229, 43 Stat. L. 936).

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That sections 128, 129, 237, 238, 239, and 240 of the Judicial Code as now existing be, and they are

severally, amended and re-enacted to read as follows:

* * * * *

"Sec. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

* * * * * *

(4) So much of 'An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes,' approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money."

Act of January 31, 1928 (C. 14, 45 Stat. L. 54).

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,* That the writ of error in cases civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

"Sec. 2. That in all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required; *Provided, however,* That the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts."

Act of April 26, 1928 (C. 440, 45 Stat. L. 466).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of an Act entitled "An Act in reference to writs of error," approved January 31, 1928, Public, Numbered 10, Seventieth Congress, be, and it is hereby, amended to read as follows:

"Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."